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U.S. Department of Justice

Environment and Natural Resources Division

BSG:DES:kb
90-11-3-07224/1

Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611

Telephone (202) 514-5471
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March 27, 2002

VIA FEDERAL EXPRESS

Hans C. Beyer, Esq.
Beyer & Associates, P.A.
1517 7th Avenue
Suite F
Tampa, FL 33605

Re: In re Raymond T. Hyer, Jr., Gardner Asphalt Corporation, et al.; United States v. Raymond T. Hyer, Jr., Gardner Asphalt Corporation, and Emulsion Products Company, Adv. Proceeding No. 02-2067 (Bankr. S.D. Fla.)

Dear Hans:

In connection with the litigation referred to above, please find enclosed a Summons and Notice of Pretrial/Trial in an Adversary Proceeding, a copy of the Complaint in the Adversary Proceeding, and an Order Setting Filing and Disclosure Requirements for Pretrial and Trial. These were served on Gardner Asphalt Corporation, through Raymond T. Hyer, Jr., in his capacity as President and Registered Agent of the Corporation, by certified mail on March 22,2002. At the same time and in the same manner, the enclosed documents were served on Emulsion Products Company through Mr. Hyer, in his capacity as CEO of that corporation. In both instances, service was in accordance with Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure.

Thank you for your attention to this.

Sincerely,

David E. Street
Senior Attorney
Environmental Enforcement Section
(202) 514-5471

Enclosures

cc: Judith Kinney, Esq.
Natalie Katz, Esq.

UNITED STATES BANKRUPTCY COURT
Southern District of Florida

FILE ORIGINAL

In re: Raymond T. Hyer, Jr.,
Gardner Industries, Inc., et al.

Case No. 92-20777; 92-20779 - 20791
Chapter 11

Debtors. /

United States of America

Plaintiff

vs.

Raymond T. Hyer, Jr., Gardner Asphalt Corporation, and Emulsion Products Company

Defendants. /

Adversary Proceeding No.

02-2067

ALL DOCUMENTS REGARDING THIS MATTER MUST BE IDENTIFIED BY BOTH ADV. & BANKRUPTCY CASE NUMBERS.

SUMMONS AND NOTICE OF PRETRIAL/TRIAL IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 25 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.*

Address of Clerk:

- ☐ 51 S.W. First Ave., Room 1517, Miami, FL 33130
- ☒ 299 E. Broward Blvd., Room 310, Ft. Lauderdale, FL 33301
- ☐ 701 Clematis St., Room 202, West Palm Beach, FL 33401

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney:

David E. Street
U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

☒ YOU ARE NOTIFIED that a pretrial conference of the proceeding commenced by the filing of the complaint will be held at the following time and place.

Address	Courtroom #: 308
	Date and Time: May 14, 2002 @ 9:30

☐ YOU ARE NOTIFIED that a trial of the proceeding commenced by the filing of the complaint will be held during the one-week trial period indicated below at the following time and place.

Address	Courtroom #: To Be
U.S. Bankruptcy Court 299 E. Broward Blvd. 33312 Fort Lauderdale, FL 33301	Trial Week: Set Pretrial
	Time:

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

MAR 8 2002
Date

KAREN EDDY
Clerk of Court
By: Sandra Mabord
Deputy Clerk

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*THE DEADLINE FOR ANSWERING THE COMPLAINT IN THE CASE HAS BEEN SHORTENED BY THE COURT PURSUANT TO THE PROVISIONS OF BANKRUPTCY RULE 7012 AND LOCAL RULE 7012-1.

CERTIFICATE OF SERVICE

I, Kenneth L. Brown (name), certify that I am, and at all times during the service of process was, not less than 18 years of age and not a party to the matter concerning which service of process was made. I further certify that the service of this summons and a copy of the complaint was made 3/22/02 (date) by:

[X] Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to:
Raymond T. Hyer, Jr.
President and Registered Agent
Gardner Asphalt Corporation
4161 East Seventh Avenue
Tampa, FL 33605

[ ] Personal Service: By leaving the process with defendant or with an officer or agent of defendant at:

[ ] Residence Service: By leaving the process with the following adult at:

[ ] Publication: The defendant was served as follows: [Describe briefly]

[ ] State Law: The defendant was served pursuant to the laws of the State of _____ (name of state), as follows: [Describe briefly]

Under penalty of perjury, I declare that the foregoing to true and correct.

3/22/02
Date

Kenneth L. Brown
Signature

Print Name	Kenneth L. Brown
Business Address	U.S. Dept. of Justice Environmental Enforcement Section
City / State / Zip	PO Box 7611, Washington, DC 20044

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ORIGINAL

(Reverse)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:	:	
	:	Chapter 11
RAYMOND T. HYER, JR.,	:	
	:	Case No. 92-20777-BKC-RBR
Debtor,	:	
	:	
In re:	:	Consolidated Case Numbers
	:	
GARDNER INDUSTRIES, INC.;	:	92-20779-BKC-RBR
GARDNER ASPHALT CORPORATION (NEW JERSEY);	:	92-20780-BKC-RBR
GARDNER INTERNATIONAL OPERATIONS, LIMITED;	:	92-20781-BKC-RBR
GAC TRANSCO, INC.;	:	92-20782-BKC-RBR
GARDNER-OVERALL, INC.;	:	92-20783-BKC-RBR
GAC TRUCKING CO., INC.;	:	92-20784-BKC-RBR
AMERICAN LAVA COATINGS CORP.;	:	92-20785-BKC-RBR
APOC OF COLORADO, INC.;	:	92-20786-BKC-RBR
ASPHALT PRODUCTS OIL CORPORATION;	:	92-20787-BKC-RBR
GARDNER ASPHALT COMPANY;	:	92-20788-BKC-RBR
GARDNER ASPHALT CORPORATION (DELAWARE);	:	92-20789-BKC-RBR
GARDNER ASPHALT CORPORATION OF DELAWARE;	:	92-20790-BKC-RBR
GARDNER ASPHALT, INC.,	:	92-20791-BKC-RBR
	:	
Debtors.	:	JOINTLY ADMINISTERED

UNITED STATES OF AMERICA,

Plaintiff,

v.

ADV. NO. 92-2067

RAYMOND T. HYER, JR.; GARDNER ASPHALT CORPORATION; and EMULSION PRODUCTS COMPANY,

Defendants. /

COURTESY COPY

UNITED STATES OF AMERICA'S COMPLAINT, ON BEHALF OF THE ENVIRONMENTAL PROTECTION AGENCY, FOR DECLARATORY RELIEF

Plaintiff, the United States of America ("United States") sues the Defendant-Debtors, Raymond T. Hyer, Jr. ("Hyer") and Gardner Asphalt Corporation ("GAC"), and Defendant Emulsion Products Company, and alleges as follows:

JURISDICTION AND VENUE

1. This is an action within the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1334(b), 1345, and 2201. The United States seeks declaratory rulings that: (1) certain claims it has against the Defendant-Debtors, Hyer and GAC, under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9703(a)(3), did not arise until after confirmation of the Debtors' plan of reorganization ("Plan"); or, in the alternative, that the United States' claim against Defendant-Debtor Hyer, is excepted from discharge under the exception for willful and malicious injury set forth in 11 U.S.C. § 523(a)(6); (2) a CERCLA claim the United States has against Defendant Emulsion Products Company, whose stock at all relevant times has been owned by Hyer but which was not a Debtor in the above cases, was not discharged as a result of confirmation of Debtors' Plan; (3) the United States is not barred from bringing its claim against Emulsion Products Company under the doctrines of res judicata, collateral estoppel, or claim preclusion.

2. This matter is an adversary proceeding brought pursuant to Bankruptcy Rule 7001(6), (9).

3. Insofar as the United States is seeking declaratory rulings that certain claims against Hyer and GAC arose post-confirmation and that its claim against Emulsion Products Company was not discharged, this action is related to cases under Title 11. Insofar as the United States is seeking, alternatively, a determination that the claim against Hyer falls within the exception from discharge under 11 U.S.C. § 523(a)(6), this action constitutes a core proceeding under the provisions of 28 U.S.C. § 157(b)(2)(I).

4. Venue is proper in the Southern District of Florida, pursuant to 28 U.S.C. § 1409(a).

PARTIES

5. Plaintiff is the United States of America acting on behalf of the EPA.

6. Defendant-Debtor Hyer resides or maintains an address at 999 Hillsboro Mile, Hillsboro Beach, Florida.

7. Defendant-Debtor GAC has offices at 4160 East Broadway, P.O. Box 5449, Tampa, Florida 33605.

8. Defendant Emulsion Products Company is a corporation organized under the laws of the State of Delaware and at all relevant times has been an affiliate of Defendant-Debtor Hyer, within the meaning of 11 U.S.C. § 101(2).

THE DEFENDANT-DEBTORS' BANKRUPTCY

9. On February 26, 1992, Gardner Industries, Inc., GACNJ, and eleven (11) other

companies owned by Hyer ("Corporate Debtors") filed for protection from their creditors under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq., in the above captioned consolidated cases nos. 92-20779-20791-BKC-RBR (S.D. Fla.).

10. On the same date, Hyer filed his Chapter 11 proceeding, case no. 92-20777-BKC-RBR (S.D. Fla.). Hyer's bankruptcy case was jointly administered with the Corporate Debtors' cases.

11. The Corporate Debtors' cases were substantively consolidated on February 25, 1993.

12. Hyer and the Corporate Debtors were reorganized under a modified "Second Amended Joint Plan of Reorganization," which this Court confirmed on March 11, 1993.

13. As the caption of the above cases reflects, EP was not a debtor; however the Defendant-Debtors and EP have claimed that, as a result of certain terms contained in the Plan, EP is included within the definition of "Hyer" set forth in the Plan and, thus, received a discharge of liabilities to the same extent as did Mr. Hyer individually.

STATUTORY BACKGROUND

14. In 1980, Congress enacted CERCLA, 42 U.S.C. § 9601 et seq., in response to the threat to public health and the environment posed by releases and threatened releases of hazardous substances.

15. Where a hazardous substance is released into the environment, or there is a substantial threat of such release, the President is authorized to take response measures consistent with the national contingency plan (40 C.F.R. Part 300) which the President deems

necessary to protect the public health or welfare or the environment. Section 104(e) of CERCLA, 42 U.S.C. § 9604(e).

16. Responsible parties are liable for "all costs of removal or remedial action incurred by the United States ... not inconsistent with the national contingency plan." Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

17. Responsible parties that are liable include persons who have arranged for the disposal of hazardous substances at the CERCLA "facility," within the meaning of 42 U.S.C. § 101(9), where a release of hazardous substances has occurred or such release is substantially threatened. Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

ANCILLARY DISTRICT COURT PROCEEDINGS IN DELAWARE

18. The United States has filed a complaint in the United States District Court for the District of Delaware ("Delaware Complaint") alleging, inter alia, that in 1981 the Defendants arranged for the disposal of hazardous substances, within the meaning of 42 U.S.C. § 9607(a)(3), at the Drum Burial Area of the Krewatch Farm Site ("Site") near Seaford, Delaware. The United States alleges, in addition, that Defendant-Debtor GAC also arranged for the disposal of hazardous substances at the Drum Burial Area of the Site in 1996, approximately three years after confirmation of the Plan.

19. The United States alleges in the Delaware Complaint that Defendants are liable, as the result of their arrangements for disposal of hazardous substances in 1981 and 1996, to pay the United States in excess of $860,000 in CERCLA response costs that the United States has incurred to remove hazardous substances from the Drum Burial Area of the Site. A copy

of the Delaware Complaint is attached hereto as Exhibit 1. The United States is willing, following the filing of Defendants' responses to the Delaware Complaint, to join with Defendants to seek to stay the litigation in Delaware until this Court has issued its decision on the merits of this adversary proceeding.

DISPOSAL AND CLEANUP OF OIL AT THE SOUTHERN PORTION OF THE KREWATCH FARM SITE

20. The Site is a farm of approximately 170 acres, approximately three-quarters of a mile north of the City of Seaford, Delaware and within 1500 feet of Beaver Creek, a small tributary of the Nanticoke River which flows into the Chesapeake Bay.

21. At all relevant times the Site was owned by Mr. Edward Krewatch ("Krewatch") or his descendants, and from 1948-1985 was used to store military surplus petroleum products.

22. On April 9, 1985, oil was spilled into the environment as the result of a fire at the Southern Portion of the Site, where a large stockpile of surplus oil had been stored in trailers, drums, and other containers.

23. At the request of the Delaware Department of Natural Resources and Environmental Control ("DNREC"), the Emergency Response Section of Region III, EPA ("ERS") began a site investigation on April 11, 1985. Based upon ERS' investigation, EPA conducted a "removal action," within the meaning of Section 311(a)(8) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(a)(8), at the Southern Portion of the Site ("1985 Removal").

24. Under a provision of the CWA in force in 1985 (33 U.S.C. § 1321(k)(1), Repealed August 18, 1990; Pub.L. 101-380, Title I, § 2002(b)(2), Aug. 18, 1990, 104 Stat. 507), EPA was empowered to clean up discharges or substantial threats of discharges of oil into or upon inland navigable waters of the United States or adjoining shorelines by accessing the Oil Spill Liability Trust Fund ("Oil Fund"), administered by the United States Coast Guard ("Coast Guard").

25. During the 1985 Removal, EPA's ERS directed the removal of 730 tons of bulk solids, sent 800 gallons of oil products to recycling facilities, repackaged and stored 4,000 gallons of oil products onsite, and secured 2,000 additional intact containers. All of the work was done at the Southern Portion of the Site.

DISPOSAL OF HAZARDOUS SUBSTANCES AT THE DRUM BURIAL AREA

26. In 1981, Krewatch allowed an individual named Tony Nero ("Nero") to use a discrete, low-lying section of the Site, encompassing approximately 900 square feet, that has since come to be known as the Drum Burial Area. The Drum Burial Area is located in the far Northern Portion of the Site next to a tree line. In 1981, Nero and/or others buried approximately 200 drums of waste in the Drum Burial Area.

27. Included among the drums buried at Nero's direction were numerous drums of foul smelling liquids received in July, 1981 by Emulsion Products Company ("EP") at its plant in Seaford, Delaware ("EP Plant"). These liquids came from a plant in Kearney, New Jersey ("Kearney Plant") owned and operated by Gardner Asphalt Corporation ("New Jersey") ("GACNJ"), a company whose stock was wholly owned by Hyer prior to confirmation of the

Plan. GACNJ was the debtor in one of the above captioned consolidated cases, no. 92-20780-BKC-RBR.

28. In the summer of 1981, Hyer personally ordered the EP Plant Manager, Newlin Buckson ("Buckson"), to bury the waste from GACNJ's Kearney Plant in Seaford, Delaware, after Buckson had questioned an earlier GAC directive to bury it.

29. The substances in the drums buried in the Drum Burial Area originated at GACNJ's Kearny Plant and at the EP Plant and consisted of asphalt waste, off-test emulsions, and spent solvents.

30. The drums buried in the Drum Burial Area contained a variety of hazardous substances, within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

INITIAL INVESTIGATION OF THE DRUM BURIAL AREA

31. As part of the site investigation phase of its 1985 Removal under the CWA, representatives of EPA's ERS inspected a suspicious area in the northern portion of the Site purported to contain drums of road tars. This location, referred to throughout this Complaint as the "Drum Burial Area," was separated by a large sweet potato field from the Southern Portion of the Site, where the fire occurred and oil was spilled.

32. Later in 1985, an EPA contractor unearthed drums in the Drum Burial Area, visually inspected their condition and contents, which appeared to be tar, and visually inspected adjacent soil. EPA's On-Scene Coordinator ("OSC") determined that drums in the Drum Burial Area posed no threat to Beaver Creek, the navigable waterway adjoining the Site.

33. Removal work at the Southern Portion of the Site concluded on or before August 29, 1985. EPA's OSC referred the Drum Burial Area to EPA's Superfund Program to investigate whether the buried drums posed any threat to the environment or public health in the longer term. EPA's OSC filed his concluding report on November 25, 1985, noting that no additional ERS attention was appropriate at that time.

1987 INSPECTIONS OF THE DRUM BURIAL AREA; RESULTS

34. On May 18 and July 28, 1987, EPA contractors conducted further investigations of the Drum Burial Area and determined that at least some of the material there originated from "a local asphalt remanufacturing plant; therefore, the contents are known." One contractor concluded that no further action should be taken respecting the drums unless their contents were determined to be hazardous. The second recommended excavating drums and sampling contained waste if policy and cost considerations warranted such action.

35. EPA requested that DNREC re-inspect the Site, including the Drum Burial Area, to permit completion of the procedure for ranking the site for possible inclusion on the National Priorities List ("NPL"). In late1987, DNREC took drum content and soil samples, had the samples analyzed, and provided EPA with a copy of the analytical results in 1988.

36. An EPA toxicologist reviewed DNREC's Site Inspection Report, including the sampling results. On December 12, 1988, she concluded that there were no contaminants at levels of toxicological concern and that the Drum Burial Area appeared to be "relatively innocuous" at that time. Thus, neither the Site as a whole nor the discrete Drum Burial Area were placed on the NPL.

ACTIVITIES RELATING TO THE DRUM BURIAL AREA, 1994-2000

37. In August, 1994, DNREC sampled soil and the contents of drums at the Drum Burial Area and found concentrations of total hydrocarbons of 100,000 parts per million ("ppm") and polyaromatic hydrocarbons of 200 ppm in a soil sample.

38. On December 1, 1995, DNREC formally notified EP that it was liable, under the Delaware Hazardous Substance Cleanup Act, 7 Del.C. § 9101 et seq., at the Drum Burial Area.

39. On June 26, 1996, Defendant-Debtor GAC, through Defendant-Debtor Hyer, entered into a voluntary cleanup agreement with DNREC, under which GAC agreed to clean up the Drum Burial Area.

40. In August 1996, Defendant-Debtor GAC hired a contractor, WIK Associates ("WIK"), to remove the buried drums; however, Defendant-Debtor GAC had its own Environmental Health and Safety Manager, Joseph G. Clemis, operate a backhoe used to excavate drums.

41. During Defendant-Debtor GAC's removal activities, Mr. Clemis punctured several buried drums with the backhoe and released a free-flowing orange liquid containing hazardous substances, including elevated levels of toluene, xylene and alkanes.

42. Following the drum puncturing incident, Defendant-Debtor GAC refused to complete the removal action and WIK backfilled the excavation area.

43. On October 3, 1996, DNREC issued an Imminent Danger Order to EP requiring EP to remove the drums, excavate contaminated soil and restore the topography of the Drum Burial Area; however, EP failed to comply with DNREC's Imminent Danger Order.

44. In March, 1997, following a request from DNREC for assistance at the Drum Burial Area, EPA took samples of drum contents and surrounding soil, had the results analyzed, and found that there had been releases of benzene, toluene, xylene and other hazardous substances into the environment and that further releases were threatened.

45. Based upon these findings, EPA determined that the Drum Burial Area posed an imminent and substantial threat to public health and the environment.

46. In the summer and fall of 1997, EPA and its team of contractors removed contaminated soil and approximately 200 buried drums from the Drum Burial Area. The removed materials contained the following compounds and elements that are hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14): acenaphthene, acetone, aldrin, anthracene, arsenic, benzene, benzo(a)anthracene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(g,h,i)perylene, benzo(a)pyrene, BHC (alpha-BHC, beta-BHC and delta-BHC), bis(2-ethylhexyl)phthalate, 2-butanone (methyl ethyl ketone), butylbenzylphthalate, cadmium, carbon disulfide, chromium, chrysene, copper, cresol (m-cresol, o-cresol (2-methylphenol), and p-cresol), cyanide, 4,4'-DDD, 4,4'-DDE, 4,4'-DDT, dibenzo(a,h)anthracene, dibenzofuran, dieldrin, di-n-butylphthalate, endosulfan I, endosulfan sulfate, endrin, ethylbenzene, fluoranthene, fluorene, gamma-chlordane, heptachlor, heptachlor epoxide, indeno(1,2,3-cd)pyrene, lead, mercury, methoxychlor, methylene chloride, 4-methyl-2-pentanone (methyl isobutyl ketone, hexone), naphthalene, nickel, phenanthrene, pyrene,

selenium, silver, sodium, styrene, tetrachloroethene, trichloroethene (trichloroethylene), toluene, xylene, and zinc.

47. As of October 31, 2000, EPA had expended over $860,000 to perform a CERCLA removal action at the Drum Burial Area to address the release and threat of release of hazardous substances there.

FIRST CLAIM FOR RELIEF

48. The United States repeats the allegations contained in paragraphs 1 through 47 above and hereby incorporates them as if fully stated herein.

49. The confirmation of a bankruptcy plan of reorganization does not discharge the debtor from any debts arising after the date of confirmation of the plan of reorganization. 11 U.S.C. § 1141(d)(1)(A).

50. In determining when an environmental claim arises within the meaning of the Bankruptcy Code, the policy goals of both the bankruptcy laws and the environmental laws must be considered and balanced.

51. A bankruptcy claim by EPA for cost recovery under CERCLA does not arise until EPA has conducted tests that reveal a release or threatened release of a hazardous substance that threatens the public health, welfare, or the environment and EPA can tie debtor to such a release or threatened release that EPA knows will lead to CERCLA response costs.

52. Unless EPA's claim against a debtor has arisen prior to confirmation, EPA cannot fairly be expected to participate in the debtor's bankruptcy proceeding and seek to balance the policy goals of CERCLA against those of the Bankruptcy Code with respect to its claim.

53. To the extent EPA or the Coast Guard ever had any claim against Hyer, GAC, or EP, as to the Southern Portion of the Site, it is a different claim than the claim which arose respecting the Drum Burial Area of the Site.

54. EPA and DNREC evaluated the Drum Burial Area during the years 1985-1988. EPA's OSC concluded in 1985 that there was no threat posed by the Drum Burial Area to Beaver Creek. EPA's toxicologist concluded on December 12, 1988, that there was no threat to the public health, welfare, or the environment at that time.

55. Any liability of the Defendant-Debtors to the United States under CERCLA with respect to the Drum Burial Area was not discharged because the claim giving rise to such liability had not arisen by the date of confirmation of the Defendant-Debtors' Plan.

SECOND CLAIM FOR RELIEF

56. The United States repeats the allegations contained in paragraphs 1 through 47 above and hereby incorporates them as if fully stated herein.

57. By directing EP's plant manager, Buckson, to bury the drums shipped from the GACNJ Plant in Kearney, New Jersey, to the EP Plant, Hyer willfully and maliciously injured another entity or its property.

58. Should the Court find that the liability of Defendant-Debtors to the United States as to the Drum Burial Area, under CERCLA, based upon the above facts, arose pre-petition and was potentially dischargeable, the claim of the United States against Hyer is excepted from discharge, under the exception for willful and malicious injury set forth in 11 U.S.C. § 523(a)(6).

THIRD CLAIM FOR RELIEF

59. The United States repeats the allegations contained in paragraphs 1 through 47 above and hereby incorporates them as if fully stated herein.

60. 11 U.S.C. § 524(e) precludes discharging the liabilities of non-debtors.

61. 11 U.S.C. § 105(a) does not authorize relief inconsistent with more specific law; hence, any injunction issued pursuant to 11 U.S.C. § 105(a) cannot discharge the liabilities of non-debtors.

62. 11 U.S.C. § 105(a) does not create substantive rights that would otherwise not be available under the Bankruptcy Code.

63. The Court's equitable powers can only be exercised within the confines of the Bankruptcy Code.

64. The Court had no jurisdiction in this case to discharge the liabilities of Emulsion Products Company, pursuant to a reorganization plan.

65. Assuming this Court could have discharged claims against Emulsion Products Company, the Plan resolving the above captioned cases did not, according to its terms, discharge Emulsion Products Company.

66. Assuming this Court could have discharged claims against Emulsion Products Company, and that under the terms of the Plan Emulsion Products Company did receive a discharge, the United States is not precluded from challenging such a discharge.

67. Assuming this Court could have discharged claims against Emulsion Products Company, and that under the terms of the Plan Emulsion Products Company did receive a discharge, such terms do not operate in this case as a discharge of Emulsion Products Company's liability under CERCLA, because such terms would effect a non-consensual release, against the United States.

68. Assuming this Court could have discharged claims against Emulsion Products Company, and that under the terms of the Plan Emulsion Products Company did receive a discharge, such terms do not operate in this case as a discharge of Emulsion Products Company's liability under CERCLA, because such terms: (1) would unfairly effect a non-consensual release, against the United States – particularly in view of the absence of notice to EPA that Emulsion Products Company would receive a discharge; or (2) were unnecessary to Debtors' reorganization.

WHEREFORE, the United States prays that this Court:

1. enter judgment in favor of the United States and against Defendant-Debtors Hyer and GAC, declaring that such claims as the United States may have against them, under CERCLA and on account of Defendant-Debtors' arrangements for disposal of hazardous substances at the Krewatch Farm Site's Drum Burial Area in 1981, arose after confirmation of the Plan and were not discharged by confirmation of the Plan.

2. in the event that the Court finds that the claim of the United States against Hyer arose pre-petition, enter judgment that the claim is excepted from discharge, under the exception for willful and malicious injury set forth in 11 U.S.C. § 523(a)(6).

3. enter judgment in favor of the United States and against the Emulsion Products Company, declaring that the Plan's discharge of Emulsion Products Company did not release Emulsion Products Company from its liabilities under CERCLA at the Krewatch Farm Site.

4. enter judgment that, to the extent the terms of Debtors' Plan may be construed, however liberally, to suggest that Debtors may have intended Emulsion Products Company to receive a discharge of liability under the Plan, the United States is not precluded from challenging the validity of the Plan's discharge of Emulsion Products Company as to its CERCLA liabilities at the Krewatch Farm Site.

5. enter judgment that any discharge granted to Emulsion Products under the Plan does not operate as a release of Emulsion Products Company's liability under CERCLA in this case, because such a release would be non-consensual, as against the United States.

6. enter judgment that any discharge granted to Emulsion Products under the Plan does not operate as a release of Emulsion Products Company's liability under CERCLA in this case, because such a release would work an injustice against the United States and was unnecessary to the confirmation of Debtors' Plan.

7. award the United States its attorney's fees and costs in bringing this action.

ATTORNEY CERTIFICATION

STAFF COUNSEL EXECUTING THIS COMPLAINT HEREBY CERTIFY that they are admitted to the Bars of the Commonwealth of Pennsylvania and the State of Florida, respectively, and that they are exempted from additional qualifications to practice in this Court pursuant to Local Rule 2090-1(B)(2)(b) pertaining to attorneys representing the United States government.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20044-7611

DAVID E. STREET
Senior Attorney
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PA.Bar No. 21664

GUY A. LEWIS
UNITED STATES ATTORNEY

By: _____
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Fla. Bar No. 702994

Dated: 3/7/02